SQUIRE PATTON BOGGS

frESH Law Horizons

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First failure to prevent bribery case. The press has reported that in the UK's first contested prosecution under the Bribery Act 2010 s.7, the defendant was convicted; however, the judge awarded an absolute discharge as, due to the company being dormant, the conviction will not be registered on its record. The company's former managing director and former project manager pleaded guilty to offences under the Act and will been sentenced at a later date.

The Office for Product Safety and Standards (Product Safety Office) has carried out its first enforcement action. A press release was issued by the Department for Business, Energy and Industrial Strategy (BEIS), confirming that a company had been fined for failure to ensure a product was made from legally harvested timber. The Product Safety Office was established earlier this year and this announcement should perhaps serve to warn that compliance and enforcement is high on the agenda, with the Head of Enforcement at the Product Safety Office saying that the conviction demonstrated how serious it is about compliance and that it will take rapid action when rules have been broken.

In addition, the Product Safety Office has this month published a Code of Practice, providing detailed guidance for businesses and regulators on product safety recalls and corrective actions. The code has been prepared in conjunction with the British Standards Institute. As a code, the document does not have the force of law and compliance is not compulsory, although it is likely to carry significant weight and, as such, will be an important document for manufacturers, retailers and market surveillance authorities. Against the background of the first enforcement action, businesses supplying products, particularly consumer goods, would be well advised to review procedures in place to ensure compliance with product safety standards and with recommendations in the Code of Practice as to how a business can monitor the safety of products and plan for a recall. Such a review should address not only internal procedures, but potentially also those of suppliers of parts and/or materials.

An airport baggage and cargo handler has been fined £502,000 following two accidents at Luton Airport in 2015, both involving vehicles. In the first, a team leader fell from a flatbed lorry driven by a colleague and, in the second, another team leader fell from an access ladder on a high-loader. The court heard that the risks had not been adequately assessed, a safe system of work to address the risk of employees falling from flatbed vehicles in these circumstances had not been implemented and there was a failure to ensure that work at height on high-loaders was properly planned, appropriately supervised and carried on in a safe manner.

A roofing company fine has been reduced by £50,000 to reflect mitigation. The Court of Appeal reduced a £160,000 fine ordered in June 2017 for breach of the Work at Height Regulations 2005. The court found that the relatively short duration of a job does not reduce the risk of very serious injury from high to medium. However, the court also held that the fine should not have been increased from the starting point in circumstances in which the judge did not then take account of mitigating circumstances prior to the discount for guilty plea. The case underlines that sentencing steps of the definitive Guideline should be taken in order, with an explanation for each decision given, to ensure that no steps are missed in the process (*R v. Wessexmoor Ltd [2018] EWCA Crim 288 [8 February 2018]*).

A substantial fine of £364,000 with costs of £117,643 has reportedly been ordered against a religious group (a registered charity) that admitted health and safety breaches, where it was alleged that the group had removed a scaffolding tower before inspectors arrived (despite being instructed by police not to touch the platform). The fine followed the death of a man who fell from a platform. Under the Sentencing Guidelines, deliberate concealment of the illegal nature of an activity and obstruction of justice are both aggravating factors that increase the seriousness of the offence. Aggravating factors should be considered when the sentencing judge determines whether to make an upward adjustment from the starting point.

The Health and Safety Executive (HSE) has released advice that warns against "off-the-shelf" manual handling training, stating that "general training in lifting techniques is an ineffective way of controlling the risks of manual handling in businesses." Instead, focused training should be properly identified by comparing the circumstances of any particular business to specific categories of risk.

Poundworld has been fined more than £1.1 million following conviction for food safety and health and safety breaches. On 9 March, Croydon Crown Court fined Poundworld £660,000 for food safety offences (arising from rodent infestation) and £500,000 for an offence under the Health & Safety at Work etc. Act 1974 and the Management of Health and Safety at Work Regulations 1999 (findings included a lack of heating in the staff room and stock room, insufficient lighting, no hot water facilities and an out-of-service goods lift). The magnitude of the total fine is a stark reminder of the severe consequences of breaching compliance obligations, particularly following the implementation of the Sentencing Guidelines 2016. It also underlines that when looking at turnover under the guidelines, the court may take into account turnover of other companies in the group, with representations reportedly being made to the court as to a private equity investment firm that had acquired the company. The judge reportedly commented that in the absence of sufficient reliable information (from the defendant), the court was entitled to draw reasonable inference that it could pay any fine.

There has been a continued press focus on food hygiene standards at UK meat plants. Following some high-profile supply chain disruptions over recent weeks, the *Guardian* has carried out a joint study with the Bureau of Investigative Journalism and has reported that more than half of the UK's audited meat plants have had at least one "major"' breach of food safety and hygiene standards in the last three years. As we highlighted in our December edition of Legal NewsBITE, wider ramifications for food business operators are likely to include increased and/or more focused inspections by regulatory authorities. The recent coverage also highlights the importance of robust supply chain mapping for those supplying direct to consumers to ensure that there is more than one source of supply for key products.

The Food Standards Agency (FSA) has reported that food hygiene ratings are improving throughout Wales and consumer recognition is at an all-time high. The Food Hygiene Rating (Wales) Act 2013 places a duty on the FSA to conduct reviews of the scheme one year after its commencement, with further reviews every three years thereafter. Reports of the review must be laid before the National Assembly for Wales. This report, the first of the required three-year reviews, shows that 84% of food businesses are displaying their food hygiene rating.

The most recent edition of our food and drink sector quarterly newsletter, Legal NewsBITE, was published this month. Please email us to subscribe.

The Environment Agency (EA) has published a list of enforcement undertakings that it accepted between 1 September 2017 and 31 January 2018 for environmental offences (including packaging, environmental permitting, fisheries and water pollution offences). There were 25 undertakings accepted in total, with the highest being £250,000 and £210,000 contributions for two fisheries offences by a water company. See our blog from 2015 on the regulations that allow the agency to accept such undertakings.

INEOS Shale has been granted permission by the Oil and Gas Authority (OGA) to legally challenge the National Trust's refusal to allow land access for seismic testing. The company wants to assess the geology in its petroleum exploration and development licence (PEDL) area, which includes the National Trust's Clumber Park Estate, to assess suitability for shale gas hydraulic fracturing. INEOS is seeking to use powers under the Mining Act to gain access to the land, but the National Trust is objecting on the basis that the planning process and associated impact assessment has not yet been completed. This is the first challenge on these issues, so it is likely to form an important precedent.

In the Climate Change Agreement (CCA) case of *Geo Speciality Chemicals v. Environment Agency* (General Regulatory Chamber NV/2017/0010, 12 January 2018), the First-Tier Tribunal (FTT) ruled on who has the power to vary the terms of CCAs. Energy intensive operators who enter CCAs receive substantial rebates of their climate change levy if they achieve energy reduction targets. The FTT held that the EA, the CCA scheme administrator, had no general power to vary the overall CCA targets. The case also provides a fairly detailed description of the complex legal structure of the CCA regime. The appellant had a stringent target, but this was dependent upon a steam power supply, which the supplier could no longer provide. The question was, therefore, whether the EA could vary the target in light of this change of circumstance. The FTT agreed with the EA that the CCA scheme did not allow the EA to do this; only the Secretary of State could do this because it would impact the sector's Umbrella CCA, not just the operator's Underlying CCA. This decision is of relevance to any operators with CCAs.

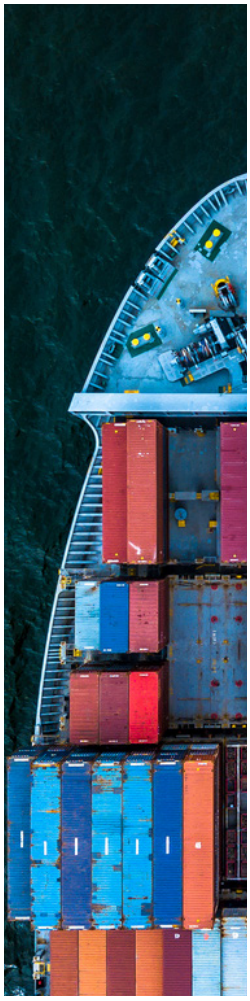
Following the recent Chinese bans on imports of recyclates, additional quality controls came into effect on 1 March, which are set to further restrict imports. These new restrictions relate to contamination levels in consignments of recyclates, and set a new level of 0.5%, compared to the previous level of 1.5%. Commentators are predicting that this will have a dramatic effect on the UK paper recycling sector and, in particular, the market for old corrugated containers (OCC). The UK has historically exported millions of tonnes of waste paper to China, but this new requirement to keep contamination under 0.5% will be hard to achieve. This could lead to paper being stockpiled in the UK, which, in turn, could impact on compliance with environmental permit conditions, and companies need to remain vigilant. Many stakeholders are calling for separate collection of waste paper, to avoid co-mingling and resultant contamination, which makes the 0.5% target so challenging.

Interaction of the EA's powers and human rights was considered in the recent case of *R (on the application of Mott) v. Environment Agency*, concerning annual fishing licences. The claimant held a historic right to fish for salmon in the Severn estuary, but the EA had a policy of phasing out this type of fishing. The EA set a catch limit substantially below the claimant's average catch levels, reducing further over time, without compensation. The case went all the way to the Supreme Court, which held that this was a deprivation of property rights and, therefore, a breach of his human rights, and compensation was required. The judge did, however, make it clear that this was an exceptional case and very much decided on the unusual facts. This case provides a rare example of human rights having been given precedence in an environmental law matter.

In a recent speech, **Environment secretary Michael Gove criticised the track record of the water utility companies on pollution and leakage**, and that the penalties handed down are still not leading to the changes that are needed. He highlighted that even Thames Water's record fine of £20 million in 2017 only represented about 10 days' worth of operating profit. Mr. Gove said he was prepared to consider regulatory changes to improve service to customers and better protect the environment, and there are already proposals to incorporate a natural capital calculator into the methodology for working out the quantum of enforcement undertakings. We can, therefore, expect the trend of higher fines and enforcement undertakings for water company pollution incidents to continue.

A proposal from the Environmental Audit Committee (EAC) to impose a **25p "latte levy" on disposable coffee cups has been questioned by the government** in its response to the EAC's report. The government acknowledged that the 5p levy on plastic bags had resulted in fewer being sold, so this was a system that it could consider, but major coffee chains are already taking action by offering discounts to customers with reusable cups, as well as by ensuring more recycling of disposable ones.

The Dutch shipping company Seatrade and two of its directors were found guilty by a Dutch court and fined up to €750,000 for breaching the rules on transfrontier shipment of waste (TFS), by sending two ships to India to be demolished. In addition, the directors were banned from executive roles at any shipping company for a year. The ships ended up on beaches in India, Bangladesh and Turkey, where their dismantling polluted the environment and endangered workers' health. Since the ships were sent to those destinations for the purpose of being demolished, they were legally waste from the moment they left port in the EU, even though they did so under their own steam. On that basis, the movement breached the ban, under the EU TFS Regulation, on shipments of waste for disposal outside of the EU. This is an unusual case, with specific facts, but it confirms that even things that can transport themselves to disposal destinations should be classified as waste.



A report released by the International Telecommunication Union (ITU), the United Nations University (UNU) and the International Solid Waste Association (ISWA) shows that in 2016 44.7 million tonnes of electronic waste were generated. This is an increase of 8% since 2014. Further, only around 20% (just under 9 million tonnes) of that waste was recycled. The trend is only set to increase, with a 17% increase predicted by 2021. The report also highlights the risk to the environment and human health of increasing levels of e-waste and its improper treatment and disposal.

The European Chemicals Agency (ECHA) has issued its 10th report on progress in evaluation under REACH. In addition to an annual update, this report provides an overview of 10 years of REACH evaluations. The overall conclusion is that safety information on chemicals is improving, but more still needs to be done. Also recently issued is the European Commission's second General Report on the operation of the REACH Regulation, which similarly concludes that there are some opportunities for further improvement, but also for simplification and burden reduction. It makes a number of recommendations to improve the implementation of the regime.

ECHA is inviting stakeholders to send it information on microplastic particles to help with the preparation of a possible restriction on intentional use of microplastic particles in products. It is particularly interested in information about the uses of microplastic particles, their alternatives, as well as the costs and other impacts of a potential restriction. The call for evidence is open until 11 May 2018.

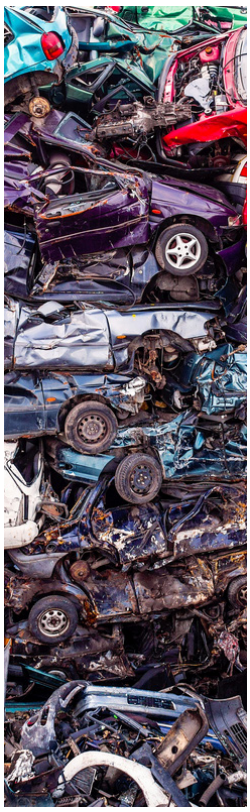
The International Maritime Organization has made amendments to the International Convention for the Prevention of Pollution from Ships (MARPOL), which take effect on 1 March 2018. The changes include requirements on vessels to collect data on oil consumption and the reclassification of some types of waste, as well as making amendments to the International Oil Pollution Prevention Certificate on ballast tanks.

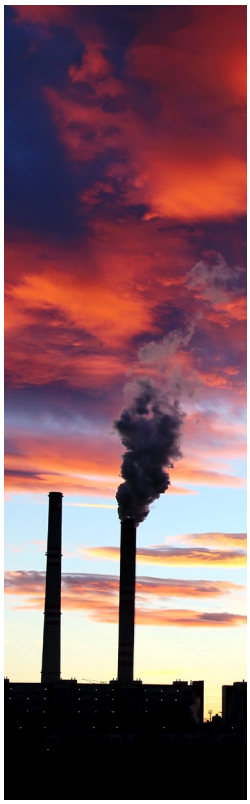
The EA has published a summary of the responses to its consultation on a proposed standard rules environmental permit for the accumulation and disposal of radioactive materials and radioactive waste at sites with a radiation detection system. All respondents agreed that a standard rules permit was likely to be the most efficient approach to protect people and the environment, but some expressed concern regarding intentionally receiving, accumulating and disposing of radioactive material and waste. The responses will inform amendments to the proposed rules.

The EA has accepted an enforcement undertaking offer from Anglian Water of a £50,000 donation to a wildlife trust charity. Anglian Water also paid the EA costs of £3,451. This followed a pollution incident where a manhole overflowed due to a blocked sewer, and polluted a watercourse. The pollution, which raised ammonia levels in the watercourse, and the blockage were related to the Yarl's Wood Immigration Centre, and there had been six blockages on the same stretch of sewer since 2011, when the sewer was transferred to Anglian Water, but the company had not mapped the sewer onto its system until after this incident. Enforcement undertakings are increasingly being used for water pollution offences under the Environmental Permitting Regulations, as an alternative to prosecution, since this became possible in 2015.

Connor Calam, also known as Riley James and trading as **Plymouth Skip Hire, narrowly escaped having an existing suspended sentence for a driving offence activated by the Crown Court, as a result of illegal waste activities.** Mr. Calam was paid to dispose of waste but instead tipped it on a farmer's land. The EA traced it back to Mr. Calam who had been paid £245 to remove the material from a building project on the understanding he was a registered waste carrier. This is a further reminder of the need to investigate the destination of waste that others take away for disposal, in order to satisfy your duty of care. Mr. Calam was fined £2,000 for breaching a suspended prison sentence and ordered to pay £2,500 costs. He was also made the subject of a 12-month community order and ordered to pay £260 compensation to Zenith Construction Ltd, plus an £85 victim surcharge.

A scrapyard operator tried to avoid environmental permitting by claiming that the vehicles at his site were for sale and were not waste, despite being partly dismantled and heaped-up. He even tried to blame child vandals for the poor condition of the vehicles. The EA had suspended Max Newbery's environmental permit in 2014 for long-standing failures to pay subsistence fees, but he continued to accept what the EA considered to be end-of-life vehicles at the site. The EA had also previously served Mr. Newbury with an Enforcement Notice requiring him to carry out improvements to the infrastructure of the scrapyard to minimise the risk of pollution and protect human health, which he had not complied with. Mr. Newbery was given a 24-week suspended prison sentence for operating an illegal vehicle dismantling business and ordered to pay £8,470 costs.





The EA has confirmed final details of the new charging scheme for environmental permits, which comes into force on 1 April 2018. Many operators subject to the permitting regime are expecting substantial increases in their permitting charges as a result. In response to its consultation in late 2017, the EA has scaled back on proposed changes relating to supplementary "first-year" subsistence charges, increases in fees for non-commercial flood risk work, "time and materials" charges for applications involving novel technologies and at high public interest sites, certain charges relating to low risk closed landfills, flood risk activity permits and intensive farming permits and, finally, in reducing charges for some WEEE producers. Operators who have environmental permits should familiarise themselves with the new charging scheme.

The compliance committee of the Aarhus Convention on environmental justice, part of the United Nations Economic Commission for Europe, has agreed to hear a complaint about the UK's adherence to the convention, jointly brought by Friends of the Earth Scotland, the Royal Society for the Protection of Birds (RSPB) and Leigh Day (a law firm). The committee already considers that the UK does not abide by all of the convention's requirements regarding access to justice in environmental cases. The complaint revolves around the judicial review process and its focus on procedure and the legality of decisions rather than their merits, as well as the need for greater weight to be given to public concerns in such proceedings. Earlier this month, the Department for Environment, Food & Rural Affairs (DEFRA) objected to the complaint on the basis of it being manifestly unreasonable and an abuse of process. The outcome of the hearing is awaited.

A joint report by four committees of the House of Commons calls for urgent changes in the management of air pollution to address a "national health crisis". This is the first time that this many committees have worked together to consider a single subject. The report concludes that the Treasury has not taken the £20 billion per year costs of poor air quality sufficiently seriously, which has led to "disjointed" fiscal incentives to reduce emissions. It also highlights priority being given to technical compliance and bureaucracy, rather than actually making real changes to improve public health. The report calls for a new Clean Air Act (based on World Health Organization air quality standards, which are stricter than EU ones), and for DEFRA to establish a fund for clean air to be funded by the automotive sector, and to look into the use of clean air zone payments to fund local air quality improvement schemes. Other recommendations include bringing forward to 2030 (instead of 2040) the deadline on new petrol and diesel cars, and that the automotive industry should take steps to address particulate emissions from brake and tyre wear, which can now greatly exceed engine emissions.

We recently posted a blog article on **Making Brexit Work for the Chemical Sector**, which references and links to the report produced by the Chemical Industries Association in partnership with our firm, examining some of the critical issues, challenges and opportunities for the sector as the UK progresses its Brexit negotiations.

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